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Supreme Court of the United States

OCTOBER TERM, 1946

No. 955

EASTMAN KODAK COMPANY,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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No. .....

EASTMAN KODAK COMPANY,
Petitioner,

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FEDERAL TRADE COMMISSION,
Respondent.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

To The Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Eastman Kodak Company, respectfully prays that a writ of certiorari be issued to review the order and decree of the United States Circuit Court of Appeals for the Second Circuit, entered in the above cause on December 11, 1946, pursuant to decision of that Court rendered on November 27, 1946, affirming an order of the Federal Trade Commission, dated September 9, 1944.

OPINIONS AND ORDERS BELOW

The order of the Federal Trade Commission was entered September 9, 1944 (R. 311-320), based upon Findings as to the Facts and Conclusions of Law dated on the same day (R. 251-309).

The opinion of the United States Circuit Court of Appeals, Second Circuit, has not yet been officially reported. A copy of the opinion, rendered November 27, 1946, and of the order and decree of that Court entered pursuant thereto dated December 11, 1946, are annexed as Appendix A and Appendix B hereto.

JURISDICTION

The opinion of the Circuit Court of Appeals was filed November 27, 1946 (Appendix A hereto). The order and decree of the Circuit Court of Appeals sought to be reviewed was entered December 11, 1946 (Appendix B hereto). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended (28 U. S. C. A. § 347(a)).

STATUTES INVOLVED

This is a proceeding under the provisions of the Act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes", approved September 26, 1914, commonly referred to as the Federal Trade Commission Act (15 U. S. C. A. 41-51). Section 5 of that Act (15 U. S .C. A. 45) insofar as material here provides:

> (a) Unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

This case involves the interpretation of Section 1 of the Sherman Anti-Trust Act (15 U. S. C. A. 1), which provides as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal: Provided, that nothing

herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under Section 5, as amended, and supplemented, of the Act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes", approved September 26, 1914: Provided, further, that the preceding proviso shall not make lawful any contract or agreement providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.

SUMMARY AND SHORT STATEMENT OF MATTER INVOLVED

Eastman Kodak Company has entered into Fair Trade Act agreements with its dealer customers prescribing minimum prices for the resale of certain commodities manufactured and produced by it, which commodities bear, or the labels or containers bear, the trade mark, brand or name of Eastman Kodak Company. Among such commodities included in said agreements are Kodachrome film for amateur use, for the taking of pictures in color, and film in magazines for amateur use, both Kodachrome and monochrome, or black and white. Eastman Kodak Company contends that such agreements are valid

and do not amount to an unfair method of competition under Section 5 of the Federal Trade Commission Act by reason of the proviso contained in Section 1 of the Sherman Act quoted above, which proviso is commonly referred to as the Miller-Tydings Amendment to Section 1 of the Sherman Act, approved August 17, 1937. While conceding that said agreements are "vertical" agreements between persons, firms or corporations not in competition with each other, that they are in effect only in those states where minimum resale price contracts are lawful under the laws of said states as applied to intrastate transactions, and that petitioner's Kodachrome film and film in magazines for amateur use bear, or the labels or containers thereof bear, the trade mark, brand or name of petitioner, the Federal Trade Commission found that petitioner's Kodachrome film and film in magazines were not in free and open competition with commodities of the same general class produced or distributed by others and hence were not within the permissive provisions of the Miller-Tydings Amendment. The petitioner contends that its Kodachrome film is in free and open competition with monochrome film for the taking of pictures in monochrome or black and white produced and distributed by others, which monochrome film is in the same general class as Kodachrome film, and that its film in magazines is in free and open competition with the same film packaged differently, either in rolls, spools, in sheets, etc., produced and distributed by others, which film is in the same general class as film in magazines. The Federal Trade Commission found that monochrome film is produced and distributed by others than the petitioner, and that the same film as petitioner's film in magazines is distributed by petitioner in other containers, and similar film is produced and distributed by others in different containers, but held that the petitioner's Kodachrome film and film in magazines were not in the same general class

as and not in free and open competition with such monochrome film and film packaged other than in magazines. Accordingly, the Federal Trade Commission ordered petitioner to cease and desist from making or enforcing any agreements prescribing minimum prices for the resale of Kodachrome film or film in magazines manufactured and distributed by it.

The petitioner petitioned the United States Circuit Court of Appeals for the Second Circuit, for review of the order of the Federal Trade Commission, and to set aside the said order of the Federal Trade Commission and dismiss the complaint herein. That Court issued its order and decree on December 11, 1946, affirming the order of the Federal Trade Commission and denying the petition for review thereof.

QUESTIONS PRESENTED

1. Should the words "same general class" in the Miller-Tydings Amendment be so construed as to include in one general class photographic film for amateur use for the taking of pictures in color and in black and white, or is Kodachrome film for amateur use in a different "general class" from monochrome or black and white film for amateur use?

2. Should the words "same general class" in the Miller-Tydings Amendment be so construed as to include in one general class photographic film for amateur use regardless of how packaged, or is film in magazines for amateur use in a different "general class" from film on rolls, in cut sheets, or in other packages?

3. If it should be determined as a matter of law in answer to questions 1 and 2 above that the words "same general class" in the Miller-Tydings Amendment include in one general class photographic film for amateur use for the taking of pictures

in color and in black and white, and include in one general class photographic film for amateur use regardless of how packaged, then as a matter of law should it not also be determined that these commodities within the same general class are in "free and open competition" with each other, under any proper construction of said words in the Miller-Tydings Amendment?

THE REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

This case presents questions of the first importance relating to the interpretation of an Act of Congress which has not heretofore been interpreted by this Court. In holding that the Fair Trade Act of Illinois (Smith-Hurd Rev. Stat., 1935, chap. 121½, §§ 188 et seq.; Illinois State Bar Stat., 1935, chap. 140, §§ 8 et seq.), which is substantially the same in its terms as the Miller-Tydings Amendment, is constitutional, this Court stated that the phrases "fair and open competition" and "any commodity", contained therein, were sufficiently definite so that "no one need be misled as to their meaning, or need suffer by reason of any supposed uncertainty". *Old Dearborn Distributing Co. vs. Seagram Distillers Corp.*, 299 U. S. 183. But this Court has never been called upon to determine and has never determined the scope of the words "same general class" and "free and open competition", as used either in the various State Fair Trade Acts or in the Miller-Tydings Amendment. An authoritative decision on this question by this Court is of utmost importance, not only to the petitioner in this cause, but also to the producers and distributors of all trade-marked or branded commodities.

Aside from the novelty and importance of the issues presented, the decision below should be reviewed for the additional reasons, we submit, that (1) it is in conflict with the principles

established by this Court in *Old Dearborn Distributing Co. vs. Seagram Distillers Corp.*, 299 U. S. 183; (2) it will have the result of placing upon the language contained in the various State Fair Trade Acts and in the Miller-Tydings Amendment such a narrow construction that persons will be and have been "misled as to their meaning"; and (3) it is in conflict with applicable decisions of the highest State Courts which have interpreted Fair Trade Acts, and upon the basis of such State Fair Trade Acts agreements prescribing minimum prices for the resale of a commodity in interstate commerce depend for their validity under the Miller-Tydings Amendment.

The fact that the decision below results in a construction of the Miller-Tydings Amendment that will cause persons to be misled as to its meaning is demonstrated by the fact that two United States District Courts and two State Courts have rendered opinions in which they reach the opposite conclusion on the identical facts and have held that the petitioner's Kodachrome film and film in magazines are in free and open competition with commodities of the same general class produced or distributed by others.

Eastman Kodak Company v. E. M. F. Electric Supply Co., 36 F. Supp. 111 (D. C. Mass. 1940)

Eastman Kodak Company v. Johnson Wholesale Perfume Co. (not officially reported) (D. C. Conn. 1941) C. C. H. Trade Regulation Service, Supp. 1941-1943, Par. 52,539

Eastman Kodak Company v. Fotoshop, Inc. (not officially reported) (N. Y. Sup. Ct. 1938) 100 N. Y. L. J. 1058, C. C. H. Trade Regulation Service, Supp. 8th Ed., Par. 25,163

Eastman Kodak Company v. H. & B. Radio Corp. (not officially reported) (N. Y. Sup. Ct. 1939)

102 N. Y. L. J. 375, C. C. H. Trade Regulation Service, Supp. 8th Ed., Par. 25,308

In addition *thirty-two* other courts, in New York, New Jersey, Pennsylvania, California, Illinois and Massachusetts have granted injunctions restraining violation of petitioner's Fair Trade Act contracts in respect to Kodachrome film and film in magazines.

Inasmuch as the Miller-Tydings Amendment makes valid only those agreements prescribing minimum resale prices which are valid by State law as applied to intrastate transactions, the decisions of the State Courts in construing the same language in their Fair Trade Laws as that contained in the Miller-Tydings Amendment are relevant. See *Supreme Lodge, Knights of Pythias v. Meyer*, 265 U. S. 30, 32, 34 (1924); *Morehead, Warden v. New York ex rel. Tipaldo*, 298 U. S. 587, 60 (1936). The decision in this cause below in construing the words "same general class" and "free and open competition" so narrowly as to exclude the petitioner's Kodachrome film and film in magazines is in conflict with applicable decisions of the highest State Courts in the following cases, among others:

Schill v. Remington Putnam Book Company, 179 Md. 83, 17 Atl. (2d) 175 (1940)

Ely Lilly & Company v. Saunders, 216 N. C. 163, 4 S. E. (2d) 529 (1939)

Miles Laboratories, Inc. v. Owl Drug Company, 67 S. C. 523, 295 N. W. 292 (1940)

Weco Products Co. v. Mid-City Cut Rate Drug Stores (not officially reported) (Calif. Super. Ct. 1940) 3 C. C. H. Trade Regulation Service, 8th Ed., Par. 25,523

Weco Products Co. v. Reed Drug Company, 225 Wisc. 474, 274 N. W. 476 (1937)

Parrott & Co. v. Somerset House, Inc. et al (not officially reported) (Calif. Super. Ct. 1937) 3 C. C. H. Trade Regulation Service, 8th Ed., Par. 25,026

Rayess v. The Lane Drug Co., Supreme Court Ohio 1941, 138 O. S. 401

In the interest of brevity (Rule 38, par. 2; *Furness, Withy & Co., Ltd. v. Yang Tsze Ins. Asso. Ltd.*, 242 U. S. 430), petitioner does not at this time set forth all the points which will be urged on the argument on the merits of this cause should the writ be granted, nor all of the contentions in support of such points; but, in order to comply with the rule of this Court requiring that all issues upon which decision is requested be presented in the petition for certiorari (*Gunning v. Cooley*, 281 U. S. 90, 98), petitioner here refers to and incorporates into this petition all of the matters presented in its petition to review and set aside the order of the Federal Trade Commission to the United States Circuit Court of Appeals, Second Circuit (R. 6-60), with the same force and effect as if herein set forth in full.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of this Honorable Court directed to the United States Circuit Court of Appeals, Second Circuit, commanding such Court to certify and send to this Court for its review and determination a transcript of the record and proceedings herein, pursuant to the provisions of law applicable thereto, to the end that said decision of the United States Circuit Court of Appeals, Second Circuit, may be reviewed by this Honorable Court, and that your petitioner

may have such other and further relief or remedy in the premises as to this Honorable Court may seem just.

Dated: January 25, 1947.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1946

No. .....

EASTMAN KODAK COMPANY,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The decision of the United States Circuit Court of Appeals, Second Circuit, in this action has not yet been reported. A copy of the decision is annexed as Appendix A to this brief.

This is a petition for a writ of certiorari to review the decision and order of the United States Circuit Court of Appeals, Second Circuit, affirming an order of the Federal Trade Commission and denying petitioner's application to set aside said order and dismiss the complaint herein.

The questions presented in this brief are:

(1) Should the words "same general class" contained in the Miller-Tydings Amendment be so construed as to place in different general classes petitioner's Kodachrome film for the taking of photographs by amateurs in color and black and white or monochrome film produced and distributed by others for the taking of photographs by amateurs in black and white or monochrome?

(2) Should the words "same general class" contained in the Miller-Tydings Amendment be so construed as to place in

different general classes petitioner's film in magazines for the taking of photographs by amateurs and the same type of film produced and distributed by others, but packaged differently, for the taking of photographs by amateurs?

(3) If it should be determined as a matter of law in answer to questions 1 and 2 above that the words "same general class" in the Miller-Tydings Amendment include in one general class photographic film for amateur use for the taking of pictures in color and in black and white, and include in one general class photographic film for amateur use regardless of how packaged, then as a matter of law should it not also be determined that these commodities within the same general class are in "free and open competition" with each other, under any proper construction of said words in the Miller-Tydings Amendment?

Statutes Involved

(See pp. 2-3 of Petition)

Statement of Case

The following facts are not in dispute:

Eastman Kodak Company, petitioner, is a corporation organized and existing under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located in Rochester, New York. It is engaged in the manufacture, sale and distribution of photographic materials, apparatus, and equipment, including amateur photographic film of various types, both black and white and Kodachrome, for taking both still and motion pictures (R. 437-438).

Petitioner's products, including its said amateur photographic film, are sold and distributed by it under its trade

mark, brand or name to dealers located in the various states of the United States and in the District of Columbia (R. 439).

One of petitioner's principal products is amateur photographic film for the taking of still and motion pictures in color, which is sold under the trade name "Kodachrome" (R. 443). Petitioner also sells in equal or greater quantity so-called black and white film, an amateur photographic film for the taking of still and motion pictures in black and white (R. 443). Although designed primarily for the taking of pictures in color, Kodachrome film is frequently used for obtaining pictures in black and white (R. 771; 3822-3824).

Another amateur photographic film manufactured, distributed and sold by petitioner in substantial quantities is Cine-Kodak film in magazines, both black and white and Kodachrome, for taking motion pictures (R. 444), and still film in magazines, both black and white and Kodachrome, for taking still pictures (R. 277). This film in magazines is the identical film manufactured, distributed and sold by petitioner in other containers, such as on rolls, and it differs from roll film *only* in the method of packaging (R. 302; 444; 1135-1136; 3385; 3758-3768; 5686-5687).

Although there are other smaller companies that manufacture and sell amateur photographic film, both motion picture and still, in the United States, the principal manufacturers other than petitioner are Agfa-Ansco Corporation of Binghamton, New York, the DuPont Film Manufacturing Corporation, and The Gevaert Company of America, Inc. (R. 287). Each of these companies manufactures, distributes and sells substantial quantites of amateur photographic black and white film, motion picture and still, in the various sizes and having the same qualities, uses and purposes as black and white film manufactured, sold and distributed by petitioner. It is

not disputed that petitioner's black and white film (except for film in magazines) is in the same *limited* class with black and white film produced or distributed by others and is in free and open competition with it (R. 1338-1340).

Since February 1938, in connection with its sale of amateur photographic film bearing its trade mark or name, including Kodachrome film and film in magazines, petitioner has entered into minimum resale price maintenance contracts with its retail dealer customers in those states where Fair Trade Acts have been enacted and are valid and existing laws, under the terms of which contracts said retail dealer customers agreed to maintain uniform minimum retail resale prices for petitioner's said amateur photographic film, including Kodachrome film and film in magazines (R. 446-447). Petitioner has made known to the trade generally that it expects and requires its dealers to abide by the terms of said minimum resale price maintenance contracts (R. 448).

Petitioner's Kodachrome film and its film in magazines are "commodities", as that term is used in the various State Fair Trade Act statutes and in the Miller-Tydings Amendment to Section 1 of the Sherman Act. Petitioner's Kodachrome film and its film in magazines, or their labels or containers, bear petitioner's trade mark, brand or name (R. 274-275).

In its complaint in this proceeding the Federal Trade Commission claimed that petitioner's Kodachrome film and its film in magazines for amateur use are not properly included in its minimum resale price maintenance contracts because they are not in free and open competition with commodities of the same general class produced or distributed by others. Petitioner claims that all amateur photographic film, whether for black and white, for color, still or motion picture, in magazines or on rolls, is in the same general class, that its Kodachrome film and

film in magazines are in free and open competition with all other amateur photographic film produced and distributed by others, and that such films are, therefore, properly included in its minimum resale price maintenance contracts.

The United States Circuit Court of Appeals, Second Circuit, in affirming the order of the Commission, said that "the statutory clause under consideration must not be so broadly construed" as to place all photographic film for amateur use in the same general class or to find free and open competition between Kodachrome film and black and white film, because that "would defeat its purpose". The Court said further that the purpose of the Miller-Tydings Amendment was "to validate resale price agreements with respect to branded commodities which are in effective competition with similar commodities produced by others so that if the resale price of the branded article were set too high the manufacturer would lose his trade by the competition of other similar articles". The Court concluded, accordingly, that "it will not do to say that all film is in the same class" because "if a purchaser wants a color film he must be able to buy it from more than one manufacturer if there is to be 'free and open competition with commodities of the same general class' ", and the fact that he can buy a black and white film is not enough (Appendix A annexed hereto).

Petitioner contends that the decision of the United States Circuit Court of Appeals is erroneous for the following principal reasons:

1. It interprets the language of the Miller-Tydings Amendment as a matter of law in a manner that does violence to the clear meaning of the words used.

2. It results in an interpretation of the Miller-Tydings Amendment that is in conflict with an applicable decision of this Court.[1]

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[1] *Old Dearborn Distr. Co. v. Seagram Distillers Corp.*, 299 U. S. 183.

3. It results in an interpretation of the language used in both the Miller-Tydings Amendment and in the Fair Trade Acts of forty-five states in a manner inconsistent with the decisions of the State Courts in construing their said statutes, and the validity of contracts under the Miller-Tydings Amendment depends upon the validity of such contracts under the various State laws.

These contentions as applied to each of the phrases, "same general class" and "free and open competition" will be discussed separately.

POINT I

The words "same general class" contained in the Miller-Tydings Amendment should be so construed as to include in one general class all photographic film for amateur use, whether Kodachrome or Monochrome and regardless of how packaged.

A.

Kodachrome Film

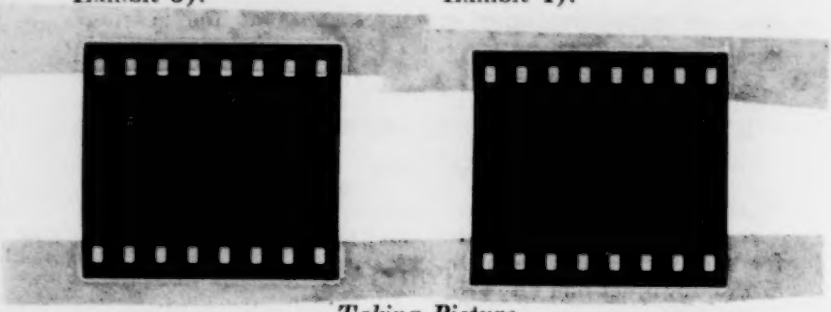
The proof at the trial established, without contradiction, that competitors of petitioner produce and distribute so-called monochrome or "black and white" film, that is film used for taking pictures in monochrome or black and white. Among such other producers and distributors of black and white film are DuPont Film Manufacturing Corporation (R. 816-817), Gevaert Company of America (R. 1099), Agfa-Ansco Division, General Analine & Film Corporation (R. 1075-1076), and others. It is petitioner's contention that the black and white film, manufactured and sold by these companies, is in the same general class with black and white film *and with*

Kodachrome film manufactured and sold by it, that all amateur film for taking pictures, whether black and white or in color, is in the same general class.

The following comparisons between Kodachrome film for amateur use and monochrome or black and white film for amateur use were established *without dispute* at the hearings herein:

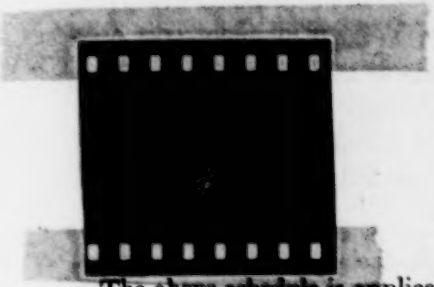
MONOCHROME (BLACK AND WHITE) FILM	KODACHROME FILM
Film Base	
Flexible support (transparent) made of cellulose acetate for safety film and cellulose nitrate for other film (R. 278, 3550-3552).	Identical (R. 278, 3550-3552).
Film Emulsion	
Particles of silver bromide and silver iodide, with gelatin added, heated to desired sensitivity value. Variations in sensitometric properties vary between different monochrome films (R. 3558-3563).	Identical. Variation in sensitometric properties between Kodachrome and Monochrome film less than variations between certain monochrome film. Emulsion prepared for monochrome film, if produced with satisfactory sensitometric properties, could be used for Kodachrome, and vice versa (R. 3570).
Film	
Film base with one or two layers of emulsion having same sensitivity coated thereon (R. 279, 3581, 3595).	Film base with three or more layers of emulsion having different sensitivity coated thereon (R. 280, 3582-3583, 3595).
Manufacture of Film	
Apparatus and staff same for Monochrome and Kodachrome films (R. 3573-3576).	Made in same kettle by same operators as Monochrome (R. 3573-3576).

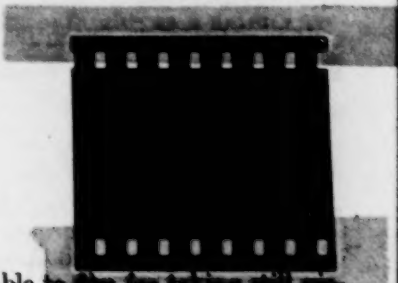
MONOCHROME (BLACK AND WHITE) FILM	KODACHROME FILM
Film	
Undeveloped **Monochrome** film (Similar to Petitioner's Exhibit 5).	Undeveloped **Kodachrome** film (Similar to Petitioner's Exhibit 4).



Taking Picture	
Load camera, estimate light conditions and adjust camera accordingly, push camera button (R. 3600-3608).	Identical. Kodachrome film requires better light conditions than some Monochrome films, and some other Monochrome films require better light conditions than Kodachrome film (R. 3600-3608).
Developing Film	
Negative produced, from which black and white print made. By use of various color processes, with three black and white negatives, a color print may be obtained (R. 279, 3780, 3851).	Very similar. Three black and white negatives (superimposed) are produced from which a transparency or positive is obtained. From this transparency is obtained either a color print, or as is often done a black and white negative from which a black and white print is made (R. 280, 3822-3824).

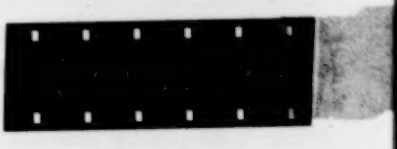
MONOCHROME (BLACK AND WHITE) FILM	KODACHROME FILM
Developed Film	
Negative produced from monochrome film (similar to Petitioner's Exhibit 6A).	Transparency produced from Kodachrome film (similar to Petitioner's Exhibit 6D).





The above schedule is applicable to film for taking still pictures. A similar schedule would be applicable to film for taking moving pictures. The following are examples of developed monochrome moving picture film and of developed Kodachrome moving picture film:

MONOCHROME (BLACK AND WHITE) FILM 16 mm.	KODACHROME FILM 16 mm.



In addition to the facts shown in the schedule above it was also established *without dispute* that, in addition to black and white prints, color prints may be obtained by use of various color processes, which are rather complicated and expensive, with three black and white negatives (R. 3851-3854), and that conversely, in addition to color prints, black and white pictures may be and often are produced from black and white negatives obtained from a Kodachrome transparency (R. 771;

3822-3824; 4105-4110. Furthermore, it was established *without dispute* that anything that can be photographed with color film can be photographed with black and white film (R. 1952) and both are used interchangeably in the same camera (R. 2365-2366; 3388-3390; 1350-1351; 3393; 5189-5202; 5359-5386; 5680-5684; 5780-5782).

It is petitioner's contention that on these undisputed facts it must be determined *as a matter of law* that the words "same general class" in the Miller-Tydings Amendment should be construed in such a way as to include in one general class Kodachrome film for amateur use and Monochrome, or black and white, film for amateur use.

The Commission found that Kodachrome film and black and white film are in two distinct groups—this is really begging the question and is saying that they are not in the same general class because they are in different classes. Suffice it to point out that witnesses called by both the Commission and petitioner testified to the contrary (R. 1011-1014, 1164-1167, 1173-1175, 1763-1765, 2741-2744, 3689-3691, 4211-4215, 4743-4746).

In the final analysis facts in respect to the technical methods of manufacture of film are irrelevant and immaterial on the question of whether Kodachrome film and black and white film are in the same general class. A Ford automobile and a Cadillac are undoubtedly manufactured differently, yet both are undoubtedly in the same *general* class. Both Kodachrome film and black and white film are used by amateurs for taking pictures, still or moving pictures (R. 1643-1653, 1708-1712, 1728, 1764-1770, 1773-1777, 1955-1963, 2154-2157, 2214-2219, 2235-2240, 2255-2259, 2270-2279, 2356, 2373-2380, 2590-2600, 2634-2645, 2748-2754, 2781-2789, 2871-2874, 2948, 3210-3217, 3253-3258, 3265, 6261-6265), anything

that can be photographed with Kodachrome film can be photographed with black and white film (R. 1952), the appearance of the two when unexposed is almost identical (R. 2365-2366, 3388-3390; see examples page 18 hereof), the technique of exposure is the same and both are used interchangeably in the same camera (R. 822-826, 999-1001, 1279-1282, 1304-1305, 1613, 2355-2362, 3393-3396), and both give as a finished result a picture resembling the original scene. These are the facts from which a determination must be made as a matter of law whether Kodachrome film and black and white film are in the same general class, and it is immaterial whether one has two or three coatings of emulsion or whether the same or different processes are used in the manufacture and processing. And in fact black and white film produced by one manufacturer, admittedly in the same general class with black and white film produced by another, is manufactured and processed differently (R. 1152-1156, 1169-1172, 1616-1619, 3577-3580).

B.

Film in Magazines

No proof was offered to support the contention that film in magazines is not in the same general class with all other film produced or distributed by others. And the facts established on the trial, both by witnesses called by the Commission and by the petitioner, prove beyond any doubt that film in magazines and other film *must* be considered to be in the same general class.

It was conceded by the Commission that the film itself, whether in magazines or on rolls, cannot be distinguished, that Zeiss, Leitz and others manufacture and distribute film in magazines, and that DuPont, Agfa-Ansco and Gevaert all make and sell a film in magazines similar to that manufactured

by petitioner and interchangeable with it (R. 555-559). A witness for the Commission, George W. Cannon, testified that film in magazines, as made by petitioner, is the same film as that on rolls, the only difference being in the packing, and this testimony was fully corroborated by others (R. 1135, 2890-2892, 3757-3768, 4184-4189, 5210, 5686-5687, 5795). The Commission so found (R. 302).

C.

Meaning and Proper Interpretation of Words "Same General Class"

The Circuit Court of Appeals held that "it will not do to say that all film is in the same class", because a purchaser desiring color film must be able to buy it from more than one manufacturer. But the Court does violence in this holding to the clear meaning of the words used in the statute. The statute refers to "same general class", not merely "same class", and we are concerned with the natural meaning of the words "same general class". Too much stress cannot be laid on the word "general"—it must be assumed to have been inserted for some purpose. The legislative body did not mean to limit the word "class", but expressly made it as broad as possible. The word "class" means:

> "A number of things ranked together as possessing some attribute in common".—Bouvier's Law Dictionary.
>
> "A number of objects having common properties".—Funk & Wagnall's Standard Dictionary.

And a "general" class would seem to indicate the broad outline of objects having a common attribute or property, and not the limited groups within each general class. All camera film has a common attribute—it consists of a cellulose base upon which emulsions are coated, and it reproduces an image upon being properly exposed to light. It should follow that all

camera film is in one general class, and should not be broken down into limited classes of colored film, black and white film, film in magazines or on rolls.

An analogy may be drawn from the definitions of the words "similar" or "like" materials used in the Tariff Act of 1930. The Court of Customs Appeals has held (*U. S. vs. Irving Massin & Bros.*, 16 Ct. Cust. Appls. 19) that "if goods are made of approximately the same materials, are commercially interchangeable, are adapted to substantially the same uses, and are so used, ordinarily, they are similar". The U. S. Supreme Court in *Greenleaf vs. Goodrich*, 101 U. S. 278 (283) has stated that it is not contemplated that "goods classed under the words 'of similar description' shall be in all respects the same". In *Japan Import Co. vs. U. S.*, 24 C. C. P. A. 167, one of the questions for determination was whether certain imported shoes were "like or similar" to domestic shoes and hence properly assessed for duty under paragraph 1530(e) of the Tariff Act of 1930. The testimony showed that the imported shoes sold below the price of the domestic shoes, that they were of inferior quality, and that the soles were different. But the evidence also showed that the imported shoes and the domestic shoes "were sold in the same establishments, to the same class of customers, and were adapted for the same uses and purposes", and the Court, therefore, held that they were "similar". And it is established that Kodachrome film and black and white film and film in magazines or on rolls are made of the same materials, are sold in the same establishments, to the same class of customers, and are adapted for the same uses and purposes, namely reproduction of an image. Accordingly, it would seem to follow that Kodachrome and black and white film, and film in magazines or on rolls, are "similar". And the words "similar" or "like" are certainly less broad than the words "*same general class*", and hence if

Kodachrome film and film in magazines are similar to other film produced or distributed by others, they must *a fortiori* be in the "same *general* class" with such other film.

The Miller-Tydings Amendment was passed in 1937 and was patterned after so-called Fair Trade Acts in existence in most of the states. The first state to pass such a Fair Trade Act was California, where resale price maintenance agreements in respect to branded commodities were made valid in 1931 (Calif. Stats. 1931, p. 583, Deering's Gen. Laws, 1931, Art. 8782; as amended in 1933, Stats. 1933, p. 793, Deering's Gen. Laws, Supp. 1933, Art. 8782). Oregon adopted a similar statute in 1933, in 1935 eight other states followed their example, and after such statutes were held constitutional in December 1936 by the United States Supreme Court (*Old Dearborn Distributing Company v. Seagram Distillers Corporation* and *McNeil v. Joseph Triner Corp.*, 299 U. S. 183, 57 S. Ct. 139; *The Pep Boys v. Pyroil Sales Company, Inc.* and *Kunsman v. Max Factor & Company*, 299 U. S. 198, 57 S. Ct. 147) state legislatures in thirty-five additional states passed similar legislation. The pattern was laid by the California statute, which legalized price maintenance of branded commodities "in fair and open competition with commodities of the same general class" produced by others. It is important to note what the California Court of last resort said about its statute and the purposes thereof, particularly since its decision was sustained by this Court. In holding the California Fair Trade Act constitutional in *Max Factor & Company v. Kunsman*, 5 Cal. 2d 446, 55 Pac. 2d 177, the California Supreme Court said (page 455 and pages 463-464):

> "In recent years, there has developed, * * * the concept that a manufacturer of a trade-marked article that is sold in competition with articles of a similar nature and who has fixed a fair price at which he, as well as his distributor and retailer, can make a fair profit, has a

property right in the goodwill towards his product which he has created, and that it is sound public policy to protect that property right against destruction by others who have no interest in it except to use it in a misleading way to deceive the public. The basic theory on which this concept rests is that, from a social standpoint, price cutting, in the long run, adversely affects the public interest, and that the public will be adequately protected against excessive prices by the ordinary play of fair and honest competition between manufacturers of similar products. This latter protection is found in Section 2 of the present act, which prohibits manufacturers contracting between themselves to fix the resale price.

* * * * *

The next major factor that must be emphasized is that the statute here involved is not solely a price fixing or regulating statute. It is true that the statute permits the producer to fix by contracts with his distributor, and the latter by contracts with retailers, the minimum resale price of the product * * *. However, to regulate prices as such was not the main purpose of the statute. The statute only applies to certain articles sold under the trade name or brand or trade mark of the producer. As to such articles, the producer or manufacturer, through advertising or other means, has built up a good will in connection with the articles, which good will is a species of property entitled to protection. When the retailer sells such an article to a customer, the article is not sold solely on the reputation of the retailer, but partially, at least, on the reputation built up by the owner of the trade mark, brand or trade name. * * * The statute, as its title indicates, by preventing price cutting, is aimed at protecting these valuable property and contract rights of the manufacturer or producer—rights just as valuable and just as much entitled to protection as the right of the retailer, who is attempting, by exercising his claimed right of freedom of action, to injure the property and contract rights of the manufacturer or producer. The statute, in other words, does not merely prohibit price cutting in order to regulate prices, but prohibits price cutting in an attempt to protect the validly acquired rights of others."

Although the California Court did not have occasion to interpret the words used in the statute, it did say that the purpose of the legislation was to protect the good will of a manufacturer of a branded commodity that is in competition with "similar products" of other manufacturers. That petitioner's Kodachrome film and film in magazines is "similar" to monochrome film and film packaged differently, all for amateur use, has been demonstrated above. The Illinois Court in *Triner Corp. v. McNeil*, 363 Ill. 559, 2 N. E. 2d 929 (one of the cases affirmed by this Court, *supra*), did have occasion to pass upon certain words and phrases in the Illinois statute (Smith-Hurd Rev. Stat., 1935, chap. 121½ §§ 188 et seq.; Illinois State Bar Stat., 1935, chap. 140, §§ 8 et seq.) and said (pages 580-581):

> "An insuperable objection to the validity of the Fair Trade Act, the defendant insists, is that the provisions of the statute are so incomplete, vague, indefinite and uncertain that men of ordinary intelligence must necessarily guess at their meaning and differ as to their application. Statutes vulnerable to the objection stated have been declared unconstitutional as denying due process * * *. On the other hand, where the words assailed, taken in connection with the context, are commonly understood, their use does not render a statute invalid * * *. Furthermore, the legislature is not required to define words in common and daily use. * * * A statute is sufficiently certain if the words and phrases employed have a technical or other special meaning well enough known to enable those within their reach to correctly apply them. * * * In the light of these authorities, the following words and expressions segregated and scrutinized by the defendant are not so ambiguous as to render the Fair Trade Act void for uncertainty: 'Articles of standard quality', employed only in the title; the phrase 'in fair and open competition' in Section 1; the words 'any commodity', and the expression 'any contract entered into pursuant to the provisions of section 1', in Section 2."

It was not even contended before the Illinois Court that the phrase "same general class" was among those considered vague, indefinite and uncertain, nor do we know of any case where a Court has heretofore been called upon to pass on these words. They "are commonly understood" and are "in common and daily use", and they are, or should be, "well enough known to enable those within their reach to correctly apply them". (*Triner Corp. v. McNeil*, 363 Ill. 559, 580). The common meaning of those words has been previously discussed and can only be taken to include Kodachrome film, film in magazines, monochrome film and film in various packages other than magazines, all for amateur use, in one *general* class.

It is submitted that as a matter of law under a proper interpretation of the words "same general class" in the Miller-Tydings Amendment petitioner's Kodachrome film and film in magazines for amateur use must be considered to be in the same general class with black and white or monochrome film and with film packaged differently, for amateur use, admittedly produced and distributed by others. That any other interpretation would be in conflict with the decision of this Court in *Old Dearborn Distributing Co. v. Seagram Distillers Corp.*, 299 U. S. 183, and with applicable decisions of state courts, will be demonstrated in Point III of this brief.

POINT II

The words "free and open competition" contained in the Miller-Tydings Amendment should be so construed as to find as a matter of law that such competition exists between petitioner's Kodachrome film for amateur use and Monochrome film produced by others for amateur use and between petitioner's film in magazines for amateur use and the same or similar film packaged differently and produced by others for amateur use.

There are certain facts that are not in dispute, and it is petitioner's contention that from these facts it must be decided as a matter of law that Kodachrome film is in free and open competition with monochrome film produced by others, both for amateur use, and that film in magazines is in free and open competition with film packaged differently produced by others, both for amateur use.

A.

Kodachrome Film

The following are the undisputed facts that establish the existence of free and open competition between petitioner's Kodachrome film for amateur use and monochrome film for amateur use produced by others:

1. The same clientele purchase both films for the same use, i. e. to get a picture of the scene being photographed (R. 3679, 3736, 4269-4271, 4339, 4546, 4675, 5035, 5218, 5619, 5679-5680, 5696, 5884).

2. Amateur photographers have a choice and make a choice between Kodachrome film and monochrome film every time they purchase film (R. 941-942, 997-998, 1104, 1090-1096, 1167-1168, 1268-1275, 3354-3377, 3679-3685, 3734-3736, 4552-4560, 5055-5062, 5749-5759).

3. In making a selection between Kodachrome film and monochrome film amateur photographers are influenced, among other considerations, by the subject matter to be photographed, by their own personal desires, and by price (R. 997-998, 1104, 1090-1096, 1167-1168, 1268-1275, 4269-4271, 4283-4290, 4620-4641, 5091-5093, 5679-5680, 5884-5887, 6414-6418).

4. If the price of Kodachrome film went up, amateur photographers would buy more monochrome film in place of it, and if the price of Kodachrome film went down to the level of monochrome film, more Kodachrome film would be purchased by amateur photographers in place of monochrome film (R. 1268-1275, 1428-1430, 1598-1599, 2572-2585, 2946-2950, 5738-5746, 5850-5855).

5. Kodachrome film and monochrome film are used for identical purposes (R. 3679, 3736, 4269-4271, 4339, 4546, 4675, 5035, 5218, 5619, 5679-5680, 5696, 5884).

6. Film in magazines is made for the express purpose of making it possible to change from Kodachrome film to monochrome film, or vice versa, in the same camera without using the entire footage (R. 266-267, 4256-4265, 4335-4338, 4409-4418, 5212-5215, 5552-5557, 5710-5721, 5797, 5889-5891).

7. All cameras that take Kodachrome film will also take monochrome film, and for those few cameras that take monochrome film but because of size will not take Kodachrome film, adapters are made (R. 1350-1351, 2590-2591, 2620-2622, 3393, 4279-4281, 5189-5202, 5359-5386, 5522-5525, 5526-5531, 5610-5616, 5680-5684, 5780-5782, 5785-5786).

B.

Film in Magazines

It would seem that the mere fact that petitioner and other manufacturers package their film in rolls, in magazines, and in other forms, would of itself prove conclusively that these films compete. For if film in magazines does not compete with other film, in other words, if it has a complete monopoly, why should

petitioner sell its film in any other form? The proof establishes (as pointed out in Point I, sub-division B, of this brief) and it was so found by the Commission (R. 302), that the film, whether on rolls or in magazines or in other packages, is the identical film. And the proof also establishes without contradiction that petitioner and other manufacturers make and sell film in magazines *and* roll film *and* cut film *and* film packs, the film itself being the same but the packaging different. DuPont, Gevaert and Agfa, as well as petitioner, make and sell film in magazines, and they are all interchangeable (R. 555-559, 3758-3768, 5174-5192).

The Commission seems to believe that if petitioner's film in magazines fits only cameras made by it, that would be proof that its film in magazines does not compete with other film. The logic of this reasoning is not clear. Even if it were true (which it is not), still there is competition between petitioner's film in magazines and all other film produced or distributed by others. The magazine method of loading is itself in competition with other methods of loading. An analogy might be drawn between a Schick Injector Razor blade and other safety razor blades—certainly they compete with one another (R. 2892-2898).

As previously pointed out, petitioner, as well as the other manufacturers, make and distribute film in magazines, in rolls and in other forms—the only reason for so doing is because some customers like film in rolls, some like it in magazines, some like it in other packages, and all compete for the customer's dollars. Sales of film on rolls and sales of film in magazines are about equal (R. 5888).

The main advantage of film in magazines is that the photographer can change from one film to another before he has used the entire footage of the one he started with, and this

change is accomplished more easily than with roll film and without loss of film (R. 4256-4265, 4335-4338, 4409-4418, 5212-5215, 5552-5557, 5710-5721, 5797). On the other hand, the disadvantages of film in magazines are that it costs more than roll film, not because of any difference in the film, for it is identical, but because the magazine costs more (R. 5720), and [redacted] it comes in only 50 foot lengths (R. 4324). And every day amateur photographers weigh the advantages and disadvantages and make a selection.

In its findings as to the facts, the Commission admits that film in magazines is "of the same kind and quality as other film" (R. 302), but nevertheless comes to the conclusion that petitioner's film in magazines is not sold in free and open competition with commodities of the same general class (R. 302). The Commission's argument is solely that when film is packed in a magazine it can only be used in a camera equipped for using such magazine, and that petitioner's magazine cameras and Bell & Howell and Perfex magazine cameras can be loaded only with petitioner's film in magazines. Consequently, the Commission finds, owners of such cameras can use only petitioner's film in magazines. Even if that were true, it definitely does *not* establish the fact that petitioner's film in magazines is not in competition with film produced or distributed by others. The amateur photographer when purchasing a camera must and does decide whether he wishes to use film packaged in magazines or on rolls or in some other container, and at that point there is competition. And of course, many amateurs, seeing advantages in both methods of packaging, have a camera for film on rolls and one for film in magazines, and every time they buy film decide which of the two they desire. There is, thus, in existence constant free and open competition between films packaged in various ways.

C.

"Free and Open Competition" as Applied to Kodachrome Film and Film in Magazines

The Circuit Court of Appeals said that the purpose of the Miller-Tydings Amendment was to validate resale price agreements with respect to branded commodities which are in effective competition with commodities produced by others "so that if the resale price of the branded article were set too high the manufacturer would lose his trade by the competition of other similar articles" (See Appendix A hereof, page 44). It is submitted that Kodachrome film and film in magazines meet this test. As heretofore pointed out, the price of Kodachrome film is definitely a determining factor in the minds of amateur photographers in making a selection between it and black and white film, and the same is true of film in magazines as against film on rolls. If Kodachrome film was the same price as black and white film, relatively more Kodachrome film would be sold, and conversely if the price of Kodachrome film went up, black and white film would be sold in its place (R. 1268-1275, 1404, 1428-1430, 1598-1599, 2572-2585, 2946-2950, 5738-5746, 5850-5855). *This is undisputed.* If free and open competition did not exist, the price of Kodachrome film would not in any appreciable way affect its relative sales to black and white film, and similarly with film in magazines and film on rolls.

Both the Commission and the Circuit Court of Appeals referred to the legislative history of the Miller-Tydings Amendment to indicate that the statute was not intended to destroy the anti-trust laws because if prices are set too high by any manufacturer, competition will take the trade away from him. In the present case it is *undisputed* that the relative price of Kodachrome film and black and white film and of film in magazines and on rolls is a determining factor as to which a purchaser will buy, and that if the price of Kodachrome film or

film in magazines is set too high by petitioner, competition from black and white film or film on rolls produced and distributed by others will take the trade away from petitioner. That is what is meant by the words "free and open competition" in the Miller-Tydings Amendment.

And the Circuit Court of Appeals further states that if Kodachrome film and monochrome film are held to compete, so also must the various types of fuel—coal, wood, oil, gas, etc.—be considered competing commodities, and the Circuit Court of Appeals concludes that the statutory clause under consideration must not be so construed as to find competition between such various types of fuel. But such a conclusion by the Court below is directly contrary to findings of this Court in *Appalachian Coals v. United States*, 288 U. S. 344, 77 L. ed. 825, in which it was found that "coal has been losing markets to oil, natural gas and water power" (p. 361) and that the coal industry had suffered "from a serious relative decline through the growing use of substitute fuels" (p. 372). Of course there *is* competition between various types of fuel, and similarly, there is competition between various types of film. The fact that petitioner cannot unreasonably raise its prices on Kodachrome film and film in magazines without losing its trade in those commodities to monochrome film and film packaged other than in magazines produced by others is the ultimate test from which it should be determined as a matter of law that competition exists.

It is submitted that under a proper interpretation of the words "free and open competition" in the Miller-Tydings Amendment petitioner's Kodachrome film and film in magazines for amateur use must be considered to be in free and open competition with black and white or monochrome film and with film packaged differently, for amateur use, admittedly pro-

duced and distributed by others. That any other interpretation would be in conflict with the decision of this Court in *Old Dearborn Distributing Co. v. Seagram Distillers Corp.*, 299 U. S. 183, and with applicable decisions of state courts will be demonstrated in Point III of this brief.

POINT III

The decision of the Circuit Court of Appeals herein is in conflict with an applicable decision of this Court and with applicable decisions of State Courts.

Although this Court has never been called upon to interpret the meaning of the words "same general class" and "free and open competition", contained in the Miller-Tydings Amendment, and the question here is a novel one and is of utmost importance to all producers and distributors of branded products, this Court has passed upon the Constitutionality of Fair Trade Laws generally. In *Old Dearborn Distributing Co. v. Seagram Distillers Corp.*, 299 U. S. 183, this Court held constitutional the Fair Trade Act of Illinois (Smith-Hurd Rev. Stat., 1935, chap. 121½, §§ 188 et seq.; Illinois State Bar Stat., 1935, chap. 140, §§ 8 et seq.). That Act provided that contracts relating to the resale price of branded commodities "in fair and open competition with commodities of the same general class produced by others" were valid under the laws of the State of Illinois. The constitutionality of the Act was attacked upon the ground, among others, that the phrases "fair and open competition" and "any commodity" were fatally vague and indefinite and, therefore, resulted in a denial of due process of law. In holding that the said phrases were sufficiently definite this Court said (pages 196-197):

> "Certainly, the phrase 'fair and open competition' is as definite as the phrase contained in § 5 of the Federal

> Trade Commission Act, 'unfair *methods* of competition', which this Court has never regarded as being fatally uncertain. Federal Trade Commission v. Gratz, 253 U. S. 421, 427, 64 L. ed. 993, 995, 40 S. Ct. 572; Federal Trade Commission v. Beech-Nut Packing Co., 257 U. S. 441, 453, 66 L. ed. 307, 313, 42 S. Ct. 150, 19 A. L. R. 882; Federal Trade Commission v. Raladam Co., 283 U. S. 643, 648, 75 L. ed. 1324, 1329, 51 S. Ct. 587, 79 A. L. R. 1191. We think the phrases complained of are sufficiently definite, considering the whole statute, and that no one need be misled as to their meaning, or need suffer by reason of any supposed uncertainty. Cf. Miller v. Schoene, 276 U. S. 272, 281, 72 L. ed. 568, 572, 48 S. Ct. 246; Standard Oil Co. v. United States, 221 U. S. 1, 69, 55 L. ed. 619, 648, 31 S. Ct. 502, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734."

Certainly, if the words "fair and open competition" are to be construed as broadly as "unfair methods of competition", such fair and open competition exists between Kodachrome film and monochrome film and between film in magazines and the same film not in magazines. For the term "unfair methods of competition" has been held to be as broad in its scope as the phrases "unsound mind", "undue influence", "unfair use", and "due process of law". *F. T. C. v. Gratz*, 253 U. S. 421, 427.

And this Court specifically stated that the phrase "fair and open competition" is sufficiently definite so that "no one need be misled" as to its meaning or "need suffer by reason of any supposed uncertainty". But the decision of the Circuit Court of Appeals herein, if sustained, *has already resulted* in not only petitioner but two United States District Courts and two New York Courts being "misled", and will cause petitioner to suffer by reason of such uncertainty. The identical question here under consideration was presented to the United States District Courts of Massachusetts and of Connecticut and to the New York State Supreme Court in the following cases:

Eastman Kodak Company v. E. M. F. Electric Supply Co., 36 F. Supp. 111 (D. C. Mass. 1940)

Eastman Kodak Company v. Johnson Wholesale Perfume Co. (not officially reported) (D. C. Conn. 1941), C. C. H. Trade Regulation Service, Supp. 1941-1943, Par. 52,539

Eastman Kodak Company v. Fotoshop, Inc. (not officially reported) (N. Y. Sup. Ct. 1938), 100 N. Y. L. J. 1058, C. C. H. Trade Regulation Service, Supp. 8th Ed., Par. 25,163

Eastman Kodak Company v. H. & B. Radio Corp. (not officially reported) (N. Y. Sup. Ct. 1939), 102 N. Y. L. J. 375, C. C. H. Trade Regulation Service, Supp. 8th Ed., Par. 25,308.

In each of these cases Eastman Kodak Company sought an injunction against the defendant to prevent the resale of its branded commodities, including Kodachrome film and film in magazines, in violation of Fair Trade Act contracts. In each of these cases the question was raised of whether Kodachrome film and film in magazines were in free and open competition with commodities of the same general class produced or distributed by others so as to be properly included in such Fair Trade Agreements, and in each of these cases the injunction was granted. In the *Johnson Wholesale Perfume Co. case* and in the *E. M. F. Electric Supply Co. case, supra,* the United States District Courts of Connecticut and Massachusetts made the following identical findings:

> "The products of the plaintiff as to which minimum retail resale prices have been established are sold at retail in Connecticut (Massachusetts) in free and open competition with commodities of the same general class produced by others."

And the Supreme Court of New York State made similar findings in the *Fotoshop, Inc.* and *H. & B. Radio Corp. cases, supra.* And in *thirty-two* other cases Courts in New York,

Pennsylvania, New Jersey, California, Illinois, and Massachusetts have granted injunctions restraining violation of Fair Trade Act contracts in respect to petitioner's Kodachrome film and film in magazines.

It seems obvious, therefore, that if the language of the Miller-Tydings Amendment is to be so narrowly construed as to hold that Kodachrome and monochrome film and film in magazines and the same film on rolls, all for amateur use, are not in the same *general* class and are not in free and open competition with each other, persons will be and necessarily have been "misled", and petitioner already has suffered and others will suffer by reason of the uncertainty thereof. Consequently, the decision of the Circuit Court of Appeals in this case is in conflict with the language used in this Court's decision in *Old Dearborn Distributing Co. v. Seagram Distillers Corp., supra.* This is particularly true since the Circuit Court's decision would permit price cutting by retail dealers of petitioner's Kodachrome film and film in magazines, for amateur use, which this Court found might be "injurious to the good will and business of the producer and distributor of identified goods" and "injurious to the general public as well", and held that the legislation here under consideration was intended to prevent such injury. *Old Dearborn Distributing Co. v. Seagram Distillers Corp.*, 299 U. S. 183, 195.

Furthermore, the Miller-Tydings Amendment makes only those agreements valid in interstate commerce which are valid in intrastate commerce under State law. By means of so-called Fair Trade laws forty-five of the States by statute permit manufacturers of branded goods to make valid resale price maintenance agreements. Of these, twenty-two of the States require that the commodities in order to come within the protection of their statutes shall be "in free and open competition with commodities of the same general class", and the statutes of the remaining twenty-three States use the words "fair and

open competition with commodities of the same general class". In a forty-sixth state (Vermont) Fair Trade contracts are permitted under common law. In only two states, Texas and Missouri, and in the District of Columbia are resale price maintenance agreements invalid.

Inasmuch as the validity of a Fair Trade contract under the Miller-Tydings Amendment depends upon its validity under the various State Fair Trade Laws, the construction placed upon those Laws by State Courts are of utmost importance. The Supreme Court of the United States has held itself bound by the courts of last resort of the several States in construing State laws.

> *Supreme Lodge, Knights of Pythias v. Meyer*, 265 U. S. 30, 32, 33
>
> *Morehead, Warden v. New York ex rel Tipaldo*, 298 U. S. 587, 609

The State Courts have construed the words "free (or fair) and open competition with commodities of the same general class" in a manner directly opposed to the decision of the Circuit Court of Appeals here. The Court of last resort of Maryland held that a *copyrighted book* was entitled to the protection of the Fair Trade Law. *Schill v. Remington Putnam Book Company*, 179 Md. 83, 17 Atl. (2d) 175. The Supreme Court of North Carolina held the Fair Trade Law of that State applicable to products "manufactured and sold by the plaintiff exclusively under a patent owned by it." *Ely Lilly & Company v. Saunders*, 216 N. C. 163, 167, 4 S. E. (2d) 528. In *Miles Laboratories, Inc. v. Owl Drug Company*, 67 S. D. 523, 295 N. W. 292, a decision of the Supreme Court of South Dakota, a patent medicine, "Alka-Seltzer", which the plaintiff had the exclusive right to manufacture and sell and which had to be purchased from plaintiff or one of its distributors, was held properly covered by a Fair Trade Agreement. In *Weco*

Products Co. v. Mid-City Cut Rate Drug Stores, not officially reported, C. C. H. Trade Regulation Service, Supp. 8th Ed., Par. 25,523, the Superior Court in California held that a patented nylon toothbrush was in fair and open competition with brushes of other materials produced by others. The same decision was reached by the Supreme Court of Wisconsin in *Weco Products v. Reed Drug Company*, 225 Wis. 474, 274 N. W. 476. The Supreme Court of New York held that the Fair Trade Act of that State was to be construed broadly, saying:

> "With the economic soundness or wisdom of the Statute the courts are not concerned. It expresses a new business policy by the law-making body of the State. It is not to receive such a narrow or strict judicial construction as virtually to destroy its purpose. Rather is it to receive a judicial construction designed to carry out that new policy, to effectuate its primary purpose, and to eliminate or to minimize, as far as possible, any hardship or inequity that may result from its application."
>
> *Calvert Distillers Corp. v. Nussbaum Liquor Store, Inc.*, 166 Misc. 342, 344.

In *Miles Laboratories, Inc. v. Seignious*, 30 Fed. Supp. 549, the United States District Court of South Carolina, in interpreting the Fair Trade Law of that State, said that "price cutting in drug products" is prohibited thereunder, thereby classifying all drug products in one general class, and other courts have classified in one general class all sporting goods (*James Heddon's Sons v. Callender*, 28 Fed. Supp. 643, D. C. Minn.), and all razor blades (*Gillette Safety Razor Co. v. Green*, 167 Misc. 251, affd. 258 App. Div. 723, N. Y. Sup. Ct.).

The decisions above referred to cannot be reconciled with the decision of the Circuit Court of Appeals in this case. It cannot be said that photographic film for amateur use is not in

the same *general* class and that a purchaser of film must be able to buy color film of more than one manufacturer to have free and open competition, and still say that copyrighted books, patented products produced and sold by one manufacturer only, all drug products, all razor blades (Schick injector as well as Gillette), and all sporting goods are in the same general class and in free and open competition with each other.

It is submitted that applicable decisions of this Court, of United States District Courts, and of State Courts are in conflict with the decision of the Circuit Court of Appeals herein, and that said decision herein should be reviewed by this Court, and upon such review should be reversed.

CONCLUSION

It is therefore submitted: (1) That the United States Circuit Court of Appeals, Second Circuit, has erroneously construed the Miller-Tydings Amendment in its decision herein, (2) that said decision herein is in conflict with applicable decisions of this Court, of United States District Courts, and of State Courts, and (3) that the questions here presented are novel and of utmost importance not only to petitioner but to the producers and distributors of all branded commodities. Accordingly, petitioner respectfully contends that this Court should review the decision of the United States Circuit Court of Appeals in order that it may be reversed.

Dated: January 25, 1947.

Respectfully submitted,

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Of Counsel

APPENDIX A

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 13—October Term, 1946.

(Argued November 7, 1946; Decided November 27, 1946.)

Docket No. 19575

EASTMAN KODAK COMPANY, *Petitioner*,

vs.

FEDERAL TRADE COMMISSION, *Respondent*.

Before: Swan, Clark and Frank, Circuit Judges.

PETITION TO REVIEW AN ORDER OF THE FEDERAL TRADE COMMISSION

By its petition Eastman Kodak Company seeks to set aside an order of the Commission directing the petitioner to cease and desist from certain alleged unfair trade practices. Petition denied and order affirmed.

Nixon, Hargrave, Middleton and Devans, Attorneys for petitioner; T. Carl Nixon, Arthur L. Stern and Thomas Kiernan, of counsel.

W. T. Kelly, Chief Counsel, Walter B. Wooden, Assistant Chief Counsel, and Daniel J. Murphy, Special Attorney, for respondent.

Isaac W. Digges, Attorney for American Fair Trade Council, Inc., Amicus Curiae.

Swan, Circuit Judge:

The petitioner, Eastman Kodak Company, manufactures and sells in interstate commerce under the trade name "Kodachrome," photographic film for the taking of still and motion pictures in color. Another of its products is Magazine Cine-Kodak Film, both black and white and Kodachrome, packaged in a magazine which fits exclusively the patent protected cameras of the petitioner or its licensees. With respect to both Kodachrome and Magazine Film the petitioner has adopted a resale price maintenance policy to control the prices at which retail dealers may sell these commodities. The order of the Commission which the petitioner seeks to have set aside directs that the petitioner desist from entering into or continuing in operation any contract with its dealer-customers providing that Kodachrome Film or Magazine Film is not to be advertised, offered for sale or sold by such dealer-customers at prices less than those specified by the petitioner. The order also provides that if conditions later change so that there are other commodities of the same general class produced or distributed by others which are sold in free and open competition with the petitioner's Kodachrome or Magazine Film, then the Commission will, upon proper showing by the petitioner, reconsider the terms of its order in the light of such new conditions.

The Miller-Tydings amendment to section 1 of the Sherman Act, 15 USCA § 1, excepts from the prohibitions of the statute resale price fixing agreements for a commodity sold under the producer's trade-mark, brand or name, provided such commodity "is in free and open competition with commodities of the same general class produced or distributed by others," and provided agreements "of that description" are lawful as ap-

plied to intrastate transactions under the law of the state within which the resale is to be made. The Commission found as a fact that the petitioner's Kodachrome Film is not in the same general class as and is not in free and open competition with black and white film and that a purchaser wishing to take photographs or moving pictures in natural color is required to purchase film for this purpose solely from the petitioner. It further found that the petitioner's Magazine Cine-Kodak Film, both black and white and Kodachrome, is not sold in free and open competition with commodities of the same general class; that petitioner's Magazine Film is the only film on the market that can be used in the petitioner's Magazine Cine-Kodak Cameras, the Bell & Howell Magazine Cameras and the Perfex Magazine Cameras; and that the owners and purchasers of such cameras can use in such cameras only Magazine Film purchased solely from the petitioner. Because of these findings the Commission concluded that the petitioner's resale price maintenance contracts covering its Kodachrome Film and its Magazine Film were not protected by the Miller-Tydings amendment. Unless so protected they constituted unfair methods of competition in violation of section 5 of the Federal Trade Commission Act, 15 USCA § 45(a). See *Federal Trade Comm. v. Beech-Nut Co.*, 257 U. S. 441; *Armand Co. v. Federal Trade Comm.*, 78 F. 2d 707 (C. C. A. 2), cert. den., 296 U. S. 650.

With respect to Kodachrome Film the petitioner limits its petition for review to the question whether it is in free and open competition with and in the same general class with black and white film. The argument is that all photographic film, whether Kodachrome or black and white, is in the "same general class," being film for taking pictures, and that color film is in free and open competition with black and white film because each competes for "the consumer dollar" inasmuch as a

person about to take a picture must choose between buying a color film or a black and white film. By analogous reasoning it may be argued that champagne and Poland Spring water are competing commodities of the same general class because both are beverages and a person desiring to quench his thirst must choose which to buy; or similarly, that the various types of fuel—coal, wood, oil, gas, etc.,—are all competing commodities of the same general class. But the statutory clause under consideration must not be so broadly construed as to defeat its purpose. As clearly appears from the legislative history of the Miller-Tydings amendment,* the purpose was to validate resale price agreements with respect to branded commodities which are in effective competition with similar commodities produced by others so that if the resale price of the branded article were set too high the manufacturer would lose his trade by the competition of other similar articles. Hence it will not do to say that all film is in the same class. If a purchaser wants a color film he must be able to buy it from more than one manufacturer if there is to be "free and open competition with commodities of the same general class"; that he can buy a black and white film will not serve to destroy the monopoly of the sole producer of color film. Hence we think the Commission has correctly construed the statutory phrase. The only other function of the court in this proceeding is the very limited one of determining whether there is any evidence to support the Commission's findings as to absence of competition between Kodachrome and black and white film. See *Trade Comm'n v. Education Society*, 302 U. S. 112, 117. It will suffice to say that it is supported by the testimony of several witnesses.

The Commission's findings with respect to Magazine Film also find support in the record testimony. Accordingly, the order is affirmed.

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*See Cong. Rec., Vol. 81, Part 7, 75th Cong., 1st Sess., pp. 7495 and 8141.

APPENDIX B

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

EASTMAN KODAK COMPANY, *Petitioner,* vs. FEDERAL TRADE COMMISSION, *Respondent.*	No. 19575

FINAL DECREE AFFIRMING AND ENFORCING ORDER TO CEASE AND DESIST

Eastman Kodak Company having filed in this Court on November 3, 1944, its petition to review and set aside an order to cease and desist issued against it on September 9, 1944, by the Federal Trade Commission, respondent, in a proceeding before said respondent entitled "In the Matter of Eastman Kodak Company, Docket 4322"; and a copy of said petition having been served upon the respondent; and the respondent having thereafter certified and filed herein, as required by the Federal Trade Commission Act, a transcript of the record in said proceedings; and the matter having been heard by this Court on briefs and oral arguments; and this Court having thereafter fully considered the matter and having rendered its decision on November 27, 1946, affirming and enforcing said order to cease and desist:

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the aforesaid petition to review be and the same hereby is dismissed, and that the said order to cease and desist be and it hereby is affirmed and en-

forced, and petitioner is hereby commanded to obey said order to cease and desist and to comply therewith.

AND IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that within three months after the entry of this decree petitioner shall file with the Federal Trade Commission a report in writing setting forth in detail the manner and form in which it has complied with said order to cease and desist.

Without prejudice to the right of the United States, as provided in Section 5 (1) of the Federal Trade Commission Act, to prosecute suits to recover civil penalties for violations of the aforesaid order to cease and desist hereby affirmed and enforced, and without prejudice to the right of the Federal Trade Commission to institute and maintain contempt proceedings for violation of this decree, this Court retains jurisdiction of this cause to enter such further orders herein from time to time as may become necessary effectively to enforce compliance in every respect with this decree and to prevent an evasion thereof.

By the Court:

THOMAS W. SWAN
CHARLES E. CLARK
United States Circuit Judges.

Filed December 11, 1946